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No. 82-1977

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINRIGHT
and JIM SMITH,

Petitioners,

vs.

CANDIDO GIARDINO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT ON JURISDICTION

Submitted by:

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QUESTION PRESENTED FOR REVIEW:

WHETHER THE JUDGMENT OF THE CIRCUIT COURT AFFORDING RESPONDENT STANDING TO CHALLENGE GROSS AND SYSTEMATIC MINORITY UNDERREPRESENTATION DURING THE GRAND JURY SELECTION PROCESS IS IN ACCORD WITH THE PRIOR DECISIONS OF THIS COURT.

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STATEMENT OF THE CASE

Respondent CANDIDO GIARDINO was indicted by the grand jury of the Eleventh Judicial Circuit of Florida, in and for Dade County, and later convicted of bribery and unauthorized compensation for official behavior. (A. 9-10).[1] On direct appeal respondent contended that the grand jury was unconstitutionally selected because of gross and systematic underrepresentation of blacks and latins on the venire from which it had been formed. (A. 11, 21-22). The state appellate Court affirmed, holding that respondent lacked standing because he was a white non-latin. (A. 21-22). After the Florida Supreme Court denied certiorari, respondent instituted habeas corpus proceedings in the district court. (A. 7-8, 9).

The district court referred the habeas corpus petition to a magistrate. The magistrate's report concluded that neither due process nor equal protection principles afforded respondent standing to voice his claim. (A. 13-17). The district court then denied relief and respondent appealed. (A. 7-8).

The United States Court of Appeals for the Eleventh Circuit reversed. (A. 1-2). The circuit court held that respondent had standing to assert unconstitutional systematic exclusion from grand jury service of minority groups other than his own. (A. 6). Petitioner now seeks certiorari review of the circuit court's judgment.

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[1] Citations in this brief are to the Appendix filed by petitioner in his jurisdictional brief.

SUMMARY OF ARGUMENT

The circuit court correctly interpreted this Court's previous decisions and held that respondent, a white non-latin, had standing to challenge the gross and systematic under-representation of blacks and latins on the venire from which the state grand jury indicting him was selected. Whether respondent's claim is analyzed in terms of due process or equal protection, the circuit court's judgment was correct.

Due process of law provides that when a state chooses to prosecute by indictment, regardless of its right to proceed upon information alone, it must utilize a constitutionally adequate method to select its grand jury. A grand jury selection procedure which is susceptible to abuse and which systematically excludes minorities to the extent that venires fail to reflect a cross-section of the community violates due process. Respondent, who was indicted by a grand jury so selected, has standing to assert this due process violation regardless of his race.

Additionally, a grand jury selection procedure which discriminates against minority representation violates equal protection of law. Invidious state conduct of this kind justifies standing for any accused who is thereby indicted. Respondent is thus entitled to challenge his conviction by proving minority discrimination in the selection of the grand jury indicting him.

ARGUMENT

THE JUDGMENT OF THE CIRCUIT COURT AFFORDING RESPONDENT STANDING TO CHALLENGE GROSS AND SYSTEMATIC MINORITY UNDERREPRESENTATION DURING THE GRAND JURY SELECTION PROCESS IS IN FULL ACCORD WITH THE PRIOR DECISIONS OF THIS COURT.

The circuit court determined that respondent, a white non-latin, had standing to prove his claim of gross and systematic underrepresentation of blacks and latins on the venire from which the state grand jury indicting him had been selected. [2/] Relying upon its earlier decision of United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), [3/] the circuit court held, in an opinion not published, that the precedents of this Court entitle respondent to prove his claim. Since this Court's decisions indeed reflect that both due process and equal protection of law require standing, the circuit court's holding was eminently correct.

A.

Due Process Requires That When A State Chooses To Prosecute By Indictment It Must Utilize A Constitutional Method Of Grand Jury Selection Which Assures Fair Cross-Section Representation Without Systematic Exclusion of Minorities.

In Peters v. Kiff, 407 U.S. 493, 504, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), a three-member plurality of this Court

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[2/] Respondent was indicted by a grand jury selected pursuant to Chapters 70-1000 and 57-550, Laws of Florida. (A. 9, 30-31, 32-40). These laws require the judges of the Eleventh Judicial Circuit of Florida, in and for Dade County, to prepare a list of five hundred (500) persons and place their names in a "grand jury box". (A. 30, 37-38). In selecting persons for the list the judges are free to choose any individual who meets the statutory criteria, i.e., not convicted of a felony, not employed as a public official, etc., provided the person is "morally fit." (A. 35-37). Names are then drawn from the grand jury box for jury service. (A. 39-40). Thus the procedure employed to select the grand jury indicting respondent was highly susceptible to discriminatory abuse. This type of susceptibility was found to be an important factor in Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)(abuse-susceptible system found to be discriminatory). Furthermore, since the selection procedure was mandated by statute the underrepresentation resulting therefrom is systematic. See Marchetti v. Linahan, 679 F.2d 236, 241 (5th Cir. 1982).

[3/] Perez-Hernandez held that an hispanic male could challenge black and female exclusion from the position of grand jury foreperson.

unequivocally declared:

> [W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

It was further recognized in Peters that this standing rule was applicable to the states because "if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury". Id., at 501. Accord: Rose v. Mitchell, 443 U.S. 551, n. 7, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) (Fourteenth Amendment applicable to operation of state grand juries); Carter v. Jury Commission of Green County, 396 U.S. 320, 330, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970) (states must "hew to federal constitutional criteria" regarding selection of grand jury).

The plurality in Peters was accompanied by a three-member concurrence which noted that it was a federal crime [4] to arbitrarily exclude an individual from any jury on the basis of race. Id., at 505. The concurrence then decided that consistent with "the central concern of the Fourteenth Amendment" an individual of any race may challenge such discrimination. Id. at 507. Thus the Peters holding: [5] a state accused may challenge exclusion of minority groups other than his own from grand jury service. [6]

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[4] 18 U.S.C. § 243.

[5] The holding of a case consists of the "position taken by those Members who concurred in the judgments on the narrowest grands". Marks v. United States, 430 U.S. 188, 194, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

[6] Petitioner feels that Peters is inapplicable to state prosecutions unless there is total exclusion of a particular minority group. (Brief of Petitioner on Jurisdiction, 21). This notion could not have sprung from Peters since, as the plurality opinion recognizes, partial exclusion of blacks was there involved. Id., at n. 3. Evidently petitioner discovered its position from a misreading of Castaneda v. Partida, supra, because it believes the Castaneda Court "defined Peters v. Kiff, as a case involving 'absolute exclusion of an identiable [sic.] group.' 430 U.S. at 493". (Brief of Petitioner on Jurisdiction, 21). Of course, however, this Court never

(continued next page)

In Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), this Court held that in a criminal trial due process requires:

> [J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Subsequently, in Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the above rule was elaborated upon and the "fair cross-section" test established. See: United States v. Yazzie, 660 F.2d 442 (10th Cir. 1981); United States v. Clifford, 640 F.2d 150 (8th Cir. 1981); United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980).

In this instance the circuit court correctly applied Peters and declared that respondent had standing to assert his claim of systematic exclusion. All that remains is respondent's opportunity to prove that the systematic exclusion denied him due process of law. 7/

B.

Equal Protection Abhores A Racially Biased Grand Jury Selected By A State Procedure That Systematically Discriminates -- All Citizens, Includinng Any Person Indicted, Are Victimized By Such Invidious Governmental Discrimination.

For one hundred years this Court has consistently applied the Equal Protection Clause to strike down convictions obtained by use of grand juries selected through practices of racial

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6/ Continued.
even entertained the thought, but simply mentioned Peters (and two other partial exclusion cases, Carter v. Jury Commission, supra, and Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1976) as a "see also" cite to one of the "earlier cases involving absolute exclusion," Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 966 (1954). Castaneda v. Partida, supra, at 493. The petitioner's contention must be considered and rejected for what it is -- a fastidious invitation to find satisfaction of the constitutional requisites upon token minority representation.

7/ Taylor and Duren determined that Sixth Amendment right to jury trial makes the fair cross-section due process test applicable to the states. What was not decided by the circuit court, and what is not now in need of determination, is whether identical standards for passing the test apply to state grand juries, which are governed by Fourteenth Amendment due process considerations.

discrimination. E.g., Castaneda v. Partida, supra; Alexander v. Louisiana, supra; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881). Until recently the equal protection rationale forbidding such tainted convictions was never challenged, although once it had been questioned upon the belief that a conviction beyond reasonable doubt vitiates the need to correct the constitutional error. See Cassell v. Texas, supra, (Jackson, J., dissenting). But in Rose v. Mitchell, 443 U.S. 551, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), this Court resoundingly rejected any attempt to sanction racial discrimination by ignoring the conviction thereby obtained.

The contention in Rose was that rejuvenation of Justice Jackson's Cassell dissent was now appropriate. However, the Rose majority considered that discrimination in the grand jury process "impairs the confidence of the public in the administration of justice," and that such discrimination "is at war with our basic concepts of a democratic society and a representative government." Id., quoting Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940). The majority then concluded that the injury suffered is not limited to the accused, but "is to society as a whole". Id.

Rejecting once again the Cassell dissent, the Court in Rose held:

> Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. For this same reason, the Court also has reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage. Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, "'[t]he court will correct the wrong, it will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review," and all without regard to prejudice. Neal v. Delaware, 103 U.S., at 394, quoting Virginia v. Rives, 100 U.S. 313, 322, 25 L.Ed. 667 (1880).

Id., at 556 (some citations omitted, emphasis added).

Rose made clear that society's paramount interest in eradicating discrimination from the judicial process is fully compatible with the state's interest in obtaining justice. Unlike other remedies for constitutional violations where exclusion of evidence from the truth seeking process is required, retrial upon an indictment obtained without discrimination leaves the state with all the proof introduced at the first trial. Id., at 557-558. Indeed, considering that the prosecution's interest is seeking justice and not merely convictions, see, e.g., Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), state officials should hardly complain whenever a defendant requests racially fair procedures for the system designed to provide that justice.

However, in this case petitioner manages an objection, contending that respondent is without standing to challenge its racially biased grand jury selection process. According to petitioner, this Court declared in Castaneda v. Partida, 407 U.S., at 494, that the accused must prove "substantial under-representation of his race or of the identifiable group to which he belongs" (emphasis added), just to limit equal protection grand jury claims to certain defendants -- those who are "fortunate" enough to be members of the discriminated group. 8/ But the strong policy "of giving the opportunity for challenging [grand juries] to too many defendants, rather than giving it to too few", Peters v. Kiff, 407 U.S., at 504, united with the mandate of Rose to eradicate discrimination in the criminal justice system, is more than enough to negate petitioner's objection to standing. Furthermore, the constitutional principles concerned with standing fully justify support for respondent's claim of discrimination.

Standing in the constitutional vein requires the claimant to demonstrate "a distinct and palpable injury to himself,

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8/ The language of Castaneda employing a discriptive proroun and subject was appropriate for the facts of that case, where a latin challenged latin underrepresentation, but it can hardly be viewed as the Court's holding.

even if it is an injury shared by a large class of other possible litigants". Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Accord, Watt v. Energy Action Educational Foundation, 454 U.S. 151, 161, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). This "injury in fact" assures sufficient concrete adverseness and interest in the outcome of a claim to make it a case or controversy attaining Article III's jurisdictional standard. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); Singleton v. Wulff, 428 U.S. 109, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). The focus of this standing inquiry is whether the claimant "has shown an injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Accord: Larsen v. Valente, 456 U.S. 228, N. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982); Valley Forge College v. Americans United, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

The injury suffered here, indictment by a grand jury selected through procedures designed to discriminate, is sufficient to provide respondent standing. Unlike all other persons in society aggrieved by the state's conduct in using racially biased methods, respondent is the focus of the indictment and the governmental conduct behind it. He suffers not as a mere spectator to the criminal justice process, but as an unwilling participant forced to defend charges made by the same opponent who utilized the discriminatory methods to initiate the controversy. The respondent's specific and unique injury as the indicted defendant thus renders him the ultimate victim of the state's discrimination. Since the remedy sought, retrial upon new indictment, will assure ceaseation of the state's discriminatory practices, respondent's injury is one appropriately addressed by a district court exercising Article III jurisdiction. See Simon v. Eastern Kentucky Welfare Rights Organization, supra, at 38.

The standing afforded respondent as a non-minority

member asserting minority discrimination is not unlike, and indeed quite analogus to, standing in First Amendment overbreadth cases. In such instances challenges are permitted that a statute is facially overbroad, regardless of the litigant's conduct, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Accord: Bigelow v. Virginia, 421 U.S. 812, 816, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). Thus, provided there is Article III jurisdiction, the defendant is permitted to assert the First Amendment rights of third persons not before the court. Schaumberg v. Citizens for Better Environment, 444 U.S. 620, 634, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); Grayned v. City of Rockford, 408 U.S. 104, 114-115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). This standing is justified to assure that society, also the victim of First Amendment suppression, is not penalized. Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). It prevents First Amendment "chill". Bigelow v. Virginia, supra, at 816.

The mandate of Rose to eliminate discrimination in the courtroom similarly requires that the decision permitting challenges to a state's racially motivated grand jury selection procedure not be concerned with the racial characteristics of the challenger. Discrimination based on race in selecting a grand jury is no less egregions then permitting an overbroad statute to "chill" First Amendment freedoms. In both instances society welcomes the litigant who hails the constitutional harm. The federal courts should be no less hospitable to the litigant who also presents an Article III case or controversy.

Respondent does present the same Article III standing criteria necessary in First Amendment cases i.e., "specific present objective harm". Bigelow v. Virginia, 421 U.S., at 817-818, quoting Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed. 154 (1972). As in Bigelow, the threat of prosecution has already blossomed into the reality of conviction. Id.,

at 817. Accordingly, the defendant properly invoked the district court's judicial power.[9/]

The standing afforded respondent by the circuit court is no different than that which this Court has previously required. Permitting a white, non-latin defendant to challenge minority discrimination offends no constitutional principle, but instead contributes to the fair and just administration of our courts. The circuit court's judgment should not be disturbed.

9/ In addition to Article III limitations, standing encompasses prudential considerations which may preclude invocation of a federal court's decisional and remedial power. See, e.g., Warth v. Seldin, 422 U.S., at 499-501. The only recognized applicable consideration in this case is whether respondent's litigation of his discrimination claim should be preempted because the rights of third persons, blacks and latins, are being adjudicated. This standing concern weighs the possibility that third persons may not wish to assert their rights and that, in any event, third persons may be the most effective advocates of their rights. See Singleton v. Wulff, 428 U.S. at 113-114. However, it can not reasonably be asserted that blacks and latins wish to forego their rights and accept discrimination in the judicial process. Further, this Court has previously recognized that despite the ability of minority groups to seek alternative remedies for porper grand jury representation, the criminal defendant remains the most effective litigant to enforce this equal protection requirement. Rose v. Mitchell, 443 U.S. at 558.

Moreover, preemption of respondent's claim is not justified, regardless of the effect upon third persons, simply because respondent presents an injury in fact which will be remedied by the relief sought. In Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 79, 80-81, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), this Court held:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

This rule is no less applicable to a criminal defendant who stands convicted upon an indictment returned by an unconstitutional grand jury.

CONCLUSION

Based upon the preceding cases,authorities, and arguments respondent requests this Court to deny the petition for certiorari review of the judgment below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was furnished to PENNY H. BRILL, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128 by mail on this 14th day of October, 1983.

Respectfully submitted,

MICHAEL ZELMAN
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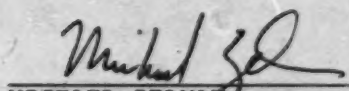

MICHAEL ZELMAN

SUPREME COURT OF THE UNITED STATES

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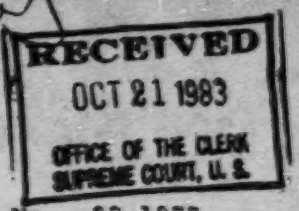

LOUIE L. WAINWRIGHT, Director, Florida Department of Corrections, et. al.,

Petitioners,

vs.

CANDIDO GIARDINO,

Respondent.

Case No. 82-1977

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, CANDIDO GIARDINO, moves pursuant to Rule 46.1 of this Court to proceed in forma pauperis, and in support thereof, states:

1. As more particularly set forth in the attached affidavit, respondent is presently unable to expend the necessary costs to participate in this proceeding.

2. Respondent previously sought leave to proceed in forma pauperis before the District Court for the Southern District of Florida, Case No. 81-1137-CIV-EBD. The District Court did not rule upon respondent's request but considered his claim nonetheless.

3. Respondent successfully sought leave to proceed in forma pauperis in the United States Court of Appeals for the Eleventh Circuit, Case No. 82-5906, which led to the decision now the subject of this certiorari proceeding.

WHEREFORE, respondent CANDIDO GIARDINO requests this Court for leave to proceed in forma pauperis.

I HEREBY CERTIFY that a ture and correct copy of the foregoing Motion To Proceed In Forma Pauperis was furnished to Penny H. Brill, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128 by mail on this 14 day of October, 1983.

Respectfully submitted,

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Miami, Florida 33137
(305) 358-1600

Michael Zelman

MICHAEL ZELMAN

SUPREME COURT OF THE UNITED STATES

LOUIE L. WAINWRIGHT, Director, Florida Department of Corrections, et. al.,

Petitioners,

vs.

CANDIDO GIARDINO,

Respondent.

Case No. 82-1977

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON CERTIORARI IN FORMA PAUPERIS

I, CANDIDO GIARDINO being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on certiorari is the following: Unconstitutional selection of Grand Jury.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No, the date of my last employment was 1981, salary [illegible] being $600.00 monthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

   Yes, I receive $18.00 monthly from a Certificate of Deposit opened 6 months ago.

3. Do you own any cash or checking or savings account?

   Yes, Certificate of Deposit worth $2500.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   No one.

Proceed On Appeal In Forma Pauperis will subject me to penalties for perjury.

CANDIDO GIARDINO

SUBSCRIBED AND SWORN before me this 14 day of October, 1983.

NOTARY PUBLIC, State of Florida
At Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT 13 1985
BONDED THRU GENERAL INS UNDERWRITERS